

**CRIMINAL LITIGATION COMMITTEE**  
**Month in Review: July 2009**

***In re United States***

No. 09-2264, 2009 WL 1975955 (7th Cir. July 10, 2009)

**Issuance of a writ of mandamus requiring a district judge to recuse himself is appropriate when he involves himself in plea negotiations and expresses displeasure with the government's decision to prosecute a defendant.**

The Seventh Circuit Court of Appeals found that because a reasonable, well-informed observer might question the impartiality of the district judge, a writ of mandamus should be issued to disqualify the district court judge from presiding over the proceeding.

In a complex case involving a defendant accused of being a felon in possession of a firearm, the district court judge called an off-the-record meeting with the U.S. attorney and the federal defender. During the meeting, the judge questioned the government's decision to prosecute the matter as a federal case, recommended that the defendant plead guilty to a false statement count, said that neither party would be pleased with his ruling on suppression motions, and suggested that the case was an embarrassment to the justice system and an inefficient allocation of taxpayer resources. After the meeting, the government filed a recusal motion and, when that motion was denied, a motion for reconsideration, noting that Fed. R. Crim. P. 11(c)(1) provides that the "court must not participate in [plea agreement] discussions." When the district court denied the motion for reconsideration and granted the defendant's motions to suppress, the government petitioned the Seventh Circuit for a writ of mandamus.

The court of appeals first rejected an argument that the petition to compel recusal was untimely because it was not made "immediately." In determining whether a petition seeking recusal is timely, the court takes a fact-specific, pragmatic approach and examines whether prejudice to the parties or the court would result from the delay. The court of appeals found that it would not be prejudicial to have a new district judge decide the suppression motions and found it acceptable that the government waited four weeks to file the mandamus petition because such filing required permission from the solicitor general.

The court of appeals then undertook its de novo review of the district court's denial of the recusal motion by noting that a petition for writ of mandamus under the All Writs Act was the proper and only means of reviewing a district court's denial of a recusal motion. It examined section 455(a) of the Judicial Code, which provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Quoting from the Supreme Court, the court of appeals found that the goal of this provision is to avoid "even the appearance of impropriety." Ultimately, the court found that recusal is required when a reasonable

person perceives a significant risk that the district judge will resolve the case on a basis other than the merits.

While the court of appeals observed that expressions of impatience, dissatisfaction, annoyance, and even anger do not ordinarily establish bias, they do raise problems if they reveal such a high degree of favoritism or antagonism as to make a fair judgment impossible. Stressing that the standard is not whether the district judge actually was biased, but, rather, whether there was an appearance of impartiality, the court of appeals concluded that the government was entitled to issuance of the writ, vacated all orders entered by the district court after the motion for recusal was filed, and directed the district judge to remove himself from the case. The Seventh Circuit concluded: “In expressing [his] views and insisting that action be taken to conform the future course of litigation to those views, the Judge misapprehended the limits of his authority as the presiding judicial officer and undertook to participate in determinations that are in the proper domain of the Department of Justice.”

**United States v. Balentine**  
569 F.3d 801 (8th Cir. 2009).

**The district court’s failure to order restitution within the MVRA’s 90-day limit did not prevent the court from ordering restitution.**

After pleading guilty to bank burglary, the defendant was sentenced on February 17, 2006, to 20 months’ imprisonment. At the sentencing hearing, there was a dispute over the amount of restitution that should be ordered. While both parties agreed that the defendant was responsible for an \$18,676 cash loss, the government argued that she was also responsible for nearly \$9,000 in other damages. The district court directed the government to provide defense counsel with invoices that would verify the amount of other damages within one week, indicating it would order restitution once the defendant responded to the invoices. The government provided the invoices, and the defendant responded. However, the district court failed to enter a restitution order and entered judgment on February 21, 2006. Roughly two years later, after the defendant had been released from prison, the probation office directed her to begin making restitution payments as a condition of her supervised release.

The defendant objected and moved the district court for an order denying restitution.

While the district court found that it failed to order restitution within the 90-day period set forth in 18 U.S.C. § 3664(d)(5), it also found that its failure to act within that time was harmless error and ordered restitution. Section 3664(d)(5) provides:

If the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim’s losses, *not to exceed 90 days after sentencing*. If the victim subsequently discovers further losses, the victim

shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief. (Emphasis added).

The Eighth Circuit Court of Appeals started its analysis by noting that federal courts have no inherent authority to order restitution and therefore must ensure that their restitution orders conform with statutory requirements. The court agreed with other circuits finding that section 3664(d)(5)'s use of the phrase "final determination" refers to entry of the restitution order. It therefore found that section 3664(d)(5) unambiguously requires entry of a restitution order within 90 days of sentencing. That did not mean, however, that a restitution order entered after the 90-day period would be invalid.

The Eighth Circuit found that the Sixth, Seventh, and Eleventh Circuits do not allow restitution orders after the 90-day period; the Second, Third, and Tenth Circuits have found that the 90-day time limit is subject to equitable tolling if the delay is attributable to the defendant; and the Second and Ninth Circuits apply a harmless error review to violations of the 90-day rule. The court took further guidance from *United States v. Montalvo-Murillo*, 495 U.S. 711, 717-18 (1990), where the Supreme Court found that "[t]here is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent."

After examining the legislative history of section 3664(d)(5), the Eighth Circuit found that the 90-day period was not meant to protect defendants. Rather, the court found that "[t]he primary and overarching goal of the MVRA [Mandatory Victims Restitution Act] is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being." (Internal quotations omitted).

Although the district court's restitution order was entered well outside the 90-day time limit, the appellate court concluded that the order was still valid. The court noted that, "[i]n light of Congress' clear intent to effectuate important public policy, . . . we cannot conclude the requirement that a court 'shall' enter an order within 90 days was intended to divest the court of authority to order restitution if the timing provision was breached."

Importantly, the court found that the defendant did not contend that the untimeliness of the order impeded her ability to dispute the amount of restitution, and it found that noncompliance with the 90-day period had no "substantial influence" on the outcome. The court declined to decide what remedies would be available to a defendant who was actually harmed by a court's noncompliance with the MVRA's 90-day requirement.

**United States v. Cameron**

No. 08-4277, 2009 WL 2152442 (4th Cir. July 21, 2009)

**Manufacturing counterfeit bills, with nothing more, does not warrant application of the leadership enhancement under the advisory Sentencing Guidelines.**

The Fourth Circuit Court of Appeals vacated the counterfeiter defendant's sentence and remanded the case for resentencing because the district court wrongly applied the "leadership enhancement" to the advisory U.S. Sentencing Guidelines (the Guidelines) range.

The defendant was convicted of uttering counterfeited obligations of the United States and falsely making and counterfeiting obligations of the United States based on his role in manufacturing counterfeit bills for a counterfeiting operation. At sentencing, the district court applied a four-level "leadership enhancement" under section 3B1.1(a) of the Sentencing Guidelines, finding that the defendant was the person who manufactured the counterfeit bills for an extensive operation.

The appellate court examined Guidelines section 3B1.1(a), which provides a four-level increase to a defendant's offense level "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." In an application note to that provision, the Sentencing Commission clarified that, for the enhancement to apply, the defendant must have been the organizer or leader "of one or more other participants," as opposed to merely "exercis[ing] management responsibility over the property, assets, or activities of a criminal organization." The Sentencing Commission directs sentencing judges to consider the following factors in determining a defendant's "leadership and organizational role":

1. the exercise of decision making authority
2. the nature of participation in the commission of the offense
3. the recruitment of accomplices
4. the claimed right to a larger share of the fruits of the crime
5. the degree of participation in planning or organizing the offense
6. the nature and scope of the illegal activity
7. the degree of control and authority exercised over others

While the court recognized that it is possible for more than one person in a scheme to qualify for the leadership enhancement, it found that the enhancement should not apply to the defendant. The court viewed the defendant as a manager over the literal and figurative currency of the counterfeiting operation, but there was no evidence that he planned or organized the operation, exercised any control or authority over other participants, recruited accomplices, or claimed any share in the fruits of the criminal activity.

The government argued that the enhancement should apply because the defendant played an integral role as the manufacturer of the bills and therefore effectively had the authority to control the flow of the bills to other participants. In rejecting this argument, the court found that this argument confused a *potential* to exercise control, which is not enough to apply the enhancement, with an *actual* exercise of control. The court also stated that

Guidelines section 2B5.1(b)(2)(A) already provides a two-level enhancement for defendants who manufacture or produce counterfeit obligations of the United States.

For the enhancement to apply, the court found that a defendant must actually have exercised authority over other participants in the operation, or actively directed its activities. While the extensiveness of criminal activity is one factor to consider, it is not enough to apply the enhancement. Otherwise, the court observed, any defendant who supplies a good or service to a criminal operation would automatically qualify for the enhancement, an interpretation that is contrary to the Guidelines.

**United States v. Carbo**

No. 07-3576, 2009 WL 1957476 (3d Cir. July 9, 2009)

**When a private citizen is prosecuted for aiding and abetting honest services fraud based on a public official's conflict of interest, the prosecution must prove that the defendant knew that the public official was required by law to disclose the conflict of interest.**

The defendant owned a contracting business that had a business relationship with a local government and with a business owned by one of the government's administrators. The administrator was required by law to disclose conflicts of interests, but he failed to do so. In a recorded conversation, the defendant denied giving the administrator any improper payments or favors in return for work, but he recognized the need for secrecy in dealing with the administrator to avoid attracting the government's attention. At times, the defendant paid the administrator's private business in cash, paid the administrator through intermediaries, did not enter the payments into his records, and referred to the administrator by a code name. After a trial, the defendant was convicted of honest services mail fraud in violation of 18 U.S.C. §§ 1341 and 1346 and of conspiracy to commit honest services mail fraud in violation of 18 U.S.C. § 371.

The Third Circuit Court of Appeals stated that honest services mail fraud occurs when someone uses the mails to engage in a "scheme or artifice to deprive another of the intangible right of honest services." Courts have recognized a specific form of honest services mail fraud, namely, when a public official fails to disclose a conflict of interest. In any honest services case, the court observed, the government must prove beyond a reasonable doubt: (1) the defendant knowingly and willfully participated in a scheme or artifice to defraud; (2) with the specific intent to defraud; and (3) the mails or interstate wire communications were used in furtherance of the scheme.

While the court recognized the general rule that ignorance of the law is no excuse for specific intent crimes, it also noted that there is an exception where, as with honest services fraud, intent to violate a legal duty is an element of the crime. The court then held that the prosecution was required to prove the defendant's knowledge that the administrator was required by law to disclose the conflict of interest. "Without the knowledge that the failure to disclose the conflict of interest is illegal," the court found, "we cannot be certain that the defendant formed the specific intent to defraud the public."

The court found that it is not necessary for the government to eliminate every other innocent possibility to convict a defendant of aiding and abetting honest services fraud:

[I]t is not necessary to demonstrate that the defendant knew the fine details of an official's reporting requirements. If the evidence is sufficient for a reasonable jury to conclude that the defendant participated in a scheme to assist a public official in hiding a conflict of interest, and that the defendant knew that the law forbade the official from engaging in that form of undisclosed conflict of interest, a conviction for honest services mail fraud should be upheld.

After examining the evidence, the court upheld the conviction, concluding that a rational juror could find that the defendant assisted the public official in disguising the conflict of interest. While the defendant may not have known the details of the public official's disclosure requirements, the jury could have reasonably inferred that he was assisting the public official to avoid a legal duty to disclose conflicts of interest. The court declined to decide whether the government would be required to show that a defendant violated state law to establish honest services fraud.

### **United States v. Moncier**

No. 07-6053, 2009 WL 1941772 (6th Cir. July 8, 2009)

### **A judge who receives disrespectful treatment from someone cannot preside over the criminal contempt trial resulting from the disrespectful treatment.**

Mr. Moncier was an attorney for a convicted defendant who was facing sentencing. At the sentencing hearing, Moncier argued, for hours and for the first time, that he could not represent his client owing to a conflict of interest. After Moncier contradicted himself several times and invited the judge to question his client, the judge attempted to do so. Moncier then tried to prevent the judge from doing so and, after being warned, was taken into custody. The judge directed the government to charge Moncier formally with criminal contempt and denied Moncier's motion for disqualification from the contempt trial. The judge presided over the contempt trial, found Moncier guilty of contempt, and sentenced him to one year of probation and a \$5,000 fine. Moncier appealed, arguing that Fed. R. Crim. P. 42(a)(3) required the judge to disqualify himself because the underlying conduct involved disrespect toward the court.

The Sixth Circuit listed the elements of criminal contempt: (1) that the defendant engaged in misbehavior; (2) that the misbehavior obstructed the administration of justice; (3) that the misbehavior occurred in the presence of the court; and (4) that the defendant acted with intent to obstruct. In his defense, the defendant argued that he was ethically obligated to obstruct the judge's questioning of his client. The Sixth Circuit found this argument beside the point, reasoning:

There is no right of revolution in a United States District Court. The lawyer's duty is not to defy the judge's orders, but to follow them. It is true enough that judges, like other humans, will make mistakes, and that those mistakes will sometimes be to the detriment of a client's rights. But that is what Circuit Courts exist to remedy. Lawyers are required to obey even incorrect orders; the remedy is on appeal. (Internal quotation omitted).

The court of appeals accepted the defendant's argument that the trial judge should have disqualified himself. Fed. R. Crim. P. 42(a)(3) provides: "If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents." In finding that this rule was violated, the court of appeals pointed to the trial judge's comments at the close of the contempt trial, in which he said that "the most bothersome aspect" of the case was

the accusations that have been made throughout the course of these proceedings that this court was somehow biased or prejudiced against either you or your client in the [underlying] case; and as I indicated in the order [denying the motion to disqualify], those certainly are allegations that could have been found to be personally offensive to this court.

The court concluded that the defendant's conduct did involve disrespect towards the trial judge within the meaning of Rule 42(a)(3), "with the ironic consequence that he gets a new trial" before a different district court judge.